JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

CHESTER G. VERNIER AND ELMER A. WILCOX.

MOTION FOR A NEW TRIAL. O. and T. Phila. Co., Jan. Sess., 1914, Nos. 554 and 555.

Commonwealth v. Sheppell, LXXVII, L. I. 636, 23 Dist. Rep. (Pa.), 904. Before Bregy, P. J., Ralston and Barratt, J. J. *Practice, Q. S.—Examination of* subject only to such observation and surveillance as might, under the circumstances, be necessary to assure his safe custody, is *res adjudicata,* both at the trial and on motion for new trial.

MURDER.

Points—Duty to instruct as to manslaughter. The prisoner's wife was found in his room dead from four pistol wounds; the prisoner was found near by, wounded by a pistol shot in the forehead. On trial for her murder, the prisoner refused to testify and the only direct evidence of the crime was the testimony of his son, called by the Commonwealth, that, on the witness' entering the room *prisoner by his own physician—Ruling of the court in banc—Res adjudicata at trial.* The refusal of the court *in banc* to permit a defendant under indictment for murder to submit himself to examination by two physicians, in the presence of his counsel, in advance of the trial, for the purpose of preparing his case, immediately after the shots, the prisoner had said to him that his wife had shot him and that he should go for a "cop." The defendant asked the trial judge to charge that if the jury believed that the killing occurred under such circumstances, the crime might not rise higher than that of manslaughter. The trial judge refused the point without reading it and stated the evidence without comment: *Held,* to be error. Ralston, J., dissents.

MURDER.

Points—Duty to charge that no inference can be drawn against prisoner from failure to testify. On a trial for murder, it is the duty of the trial judge, if requested so to do, to instruct the jury that no inference can be drawn against the prisoner by reason of the fact that he did not testify in his own behalf, notwithstanding the fact that no reference to the prisoner's failure to testify has been made by either the district attorney or the trial judge. The refusal of such a point is error, although the point was not read to the jury. Ralston, J., dissents.

JOHN LISLE.

AN ITALIAN DECISION IN A CASE OF LIBEL.

(From La Ginstizia Penale, July 29, 1914, p. 1232.) Readers will have seen the letter written by the German dramatist, Hauptmann, to Jean Rolland, in answer to one written by Rolland to Hauptmann. Americans have been puzzled to read in Hauptmann's letter that he had the right to a reply twice as long as Rolland's letter. The sky is cleared by a decision of an Italian court, which holds that the Press Act does not give an editor the right to mutilate the reply of a reader who has been mentioned or indicated in an attack appearing in his paper, nor to suppress any part of it, nor to modify in any way its contents or its form, but must insert the whole of it, in as conspicuous a place as the attack occupied, and just as the author has written it, because the author alone is the judge of what his answer is to be, of the means of his defense, and of the opportuneness of it; provided, however, that he keeps within the limits of the law, and does not speak "injuriously" of the editor, or of a third party. A, the person attacked, who replied to the editor, and sued the latter for not publishing the reply, was *held* not to have been aggrieved, because he went beyond the limits of the law, and said, in the course of his defense: "I have never been anarchistically inclined, and whoever asserts the contrary lies shamelessly. I have scrupulously adhered to the resolution, unmindful of the praises of adversaries and despising the insinuations and the calumnies of certain persons;"

since, although the editor was not mentioned, the author unquestionably referred to him, and since, when one refers to another as a shameless liar and as the disseminator of insinuations and calumnies, he offends his honor, his reputation and his decorum. ROBERT FERRARI.

INTERNATIONAL LAW.

Effect of suspension clause in treaties upon domestic legislation. To students of international law there is an important decision by the Court of Cassation in Rome, First Section, reported in *La Giustizia Penale* (II, 84 fol.), (July 22, 1914). At the Convention of Berne it was agreed by the contracting parties, which included fourteen European nations, that women and children should work no later than 10 p. m. and no earlier than 5 a. m., and no longer than eight and one-half hours. The agreement was to go into effect "when this convention is ratified by all the governments of the contracting parties." Italy passed a law giving "the government of the king authority to execute fully and entirely the convention signed at Berne the 26th of September, 1906, between Italy (etc., including thirteen other states) for the prevention of night work to women employed in industry." Penal sanctions were attacked. Two governments did not ratify the convention. An employer allowed a woman to work past 10 p. m. Had he violated the criminal law in so doing? The court held that "to execute the convention" meant to "ratify the convention;" that is, Parliament had not put the convention into effect in Italy, but had only given the government authority to ratify the contract of its representatives; because, for making the convention effective, the consent of all the contracting governments was necessary, the clause, "when this (convention) is ratified by all the governments of the contracting parties," meaning that no nation could execute the terms of the Berne Convention unless all the other nations did likewise; and the employer was therefore not bound by the law. Giuseppe Meloni, one of the editors of *La Giustizia Penale,* contributes a learned and interesting note to the case, in which he disagrees with the decision upon the grounds that there is no precedent for it, that the precedents are all against it, and that in reason it is wrong. The clause in dispute "establishes the minimum of ratifications which are necessary, *without other act on the part of any government,* to fix the beginning of the coming into effect of the convention within a certain time." The note is about 3,000 words long, and is a complete, compact, short treatise on "The Perfection of International Treaties While the Sending of the Ratification of the Contracting States Is Awaited; and the Value of a Domestic Law Which Authorizes the Execution of Them." He treats the question under the following heads: 1. The position of the Question. (a) From the side of the decisions; (b) From the theoretical side. 2. International treaties of administrative law. 3. The value of the signastate, severely criticized him in public speech and then sought to reprobate him tures of the representatives of the various states in preliminary negotiations; the idea and efficacy of a suspensive condition in a contract; when a contract is said to be perfected. 4. Rules of state law (declaration of the will of the state) directed to the execution of the terms of treaties; conclusions. The reasoning of the note seems to be sound. ROBERT FERRARI.

LIABILITY OF A FINDER TO THE PENAL LAW.

(From La Giustizia Penale, Aug. 20, 1914, p. 1337.) An article found in a corner of the stoop of an inn is considered lost, since it cannot said to be in the "sphere of proprietary activity" of the owner; this sphere of activity extending to the limits of the room or apartment assigned to a person, but not to the whole inn with all its appurtenances, common to all the travelers. A found a bracelet on the stoop of B, an inn. A was arrested for larceny and convicted. Conviction was quashed in the Court of Appeals. The essential element in the crime of larceny is the taking of possession by one's self of that of which another has not only property but also possession, possession being defined as having under custody, immediate or mediate. When, therefore, a thing goes out of the custody of a person, or is no more under the sphere of supervision of the owner, the latter, although retaining over that thing his right as owner, has lost the possession of it, and a person who finds it and appropriates it is not guilty of larceny, because the *contrectatio* is lacking, although he may be guilty of unlawful appropriation of a lost article.

JUDICIAL DECISIONS

There is room for a Journal of Comparative Law, which will give digests and discussions of the decisions of the courts of last resort of European countries. Nothing can more clearly bring into relief the qualities and the defects of our own law. *La Giustizia Penale* is one of the very best annotated reporters.

ROBERT FERRARI.

CONSTITUTIONAL LAW.

Davis v. Berry et al., 216 Fed. 413. *Sterilization of criminals.* Acts 35th Gen. Assemb. Iowa, c. 187, providing for the performance of the operation of vasectomy on criminals twice convicted of a felony, is unconstitutional as providing a cruel and unusual punishment. And since the operation is to be performed on an order of the State Board of Parole after a private hearing before the board, not open to the public, and of which the prisoner is not advised until ordered to submit to the operation, it is also unconstitutional as a deprivation of due process of law, which means that every person must have his day in court, must be confronted by his accuser, and given a public hearing according to law in the regular course of its administration through courts of justice. It is also unconstitutional as a bill of attainder, in that it provides for the infliction of a punishment for past offenses by legislative act without a jury trial.

Commonwealth v. Farmer, Mass., 106 N. E. 150. *Short forms of indictment.* Rev. Laws, c. 218, setting forth short forms of indictments, does not violate Bill of Rights, art. 12, providing that no subject shall be held to answer for any crime or offense until it is fully, plainly, substantially and formally described to him; nor does it violate Const. U. S., Amend. 14, or any other provision of that constitution, especially in view of sec. 39, authorizing the court to require the prosecution to furnish a bill of particulars.

Jonson v. United States, 215 Fed. 679. *White Slave Act. 'Commerce.'* Since the term "commerce," as used in the federal constitution, granting to Congress the right to legislate with reference to interstate and foreign commerce, is not limited to traffic in or an exchange of commodities, but extends as well to the transportation of persons, and includes navigation and intercourse, giving to Congress not only the right to regulate, but actually to prohibit transportation in the interest of the public welfare, Congress had complete power to pass the White Slave Act, making it a felony to transport or cause to be transported any woman or girl for prostitution, or any other immoral purpose, though the statute be construed as extending beyond commercialized vice to include transportation in interstate commerce of a female for the purpose of mere unlawful sexual intercourse with defendant.

DETECTIVE.

Brantley v. State, Miss., 65 S. 512. *Crime committed to secure evidence.* The defendant was convicted of the statutory crime of acting as the agent of the purchaser in the unlawful purchase of intoxicating liquor. On the trial he offered evidence to show that he had been asked by a deputy sheriff to aid in ferreting out "blind tigers" and particularly in getting evidence against the person from whom he bought this liquor; that after he received the money from the purchaser and before he bought the liquor he reported the case to the deputy sheriff, who asked him to make the purchase, so that evidence might be obtained against the seller, and promised that no harm would result to him from so doing. The trial court excluded this evidence. Held that the evidence was properly excluded as in order to provide the seller with an opportunity to violate the law the defendant committed a crime distinct from and not included in the one the seller was induced to commit. The case was distinguished from those in which the detective coöperates with criminals so that he would be guilty of the crime committed by them if his intention had been the same as theirs. The conviction was affirmed.

DISORDERLY CONDUCT.

People v. Sinclair, 149 N. Y. Supp. 54. *Elements of the Offense.* Laws 1882, c. 1458, provides that every person in the city and county of New York shall be guilty of disorderly conduct tending to a breach of the peace, who in any thoroughfare or public place shall commit any of the following offenses: "(3)

Every person who shall use any threatening, abusive or insulting behavior with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned." Where defendant, occuping no relation to Rockefeller, whom defendant believed to be responsible for certain public occurrences in another by parading in processional form in the street with companions, all wearing crepe, opposite a building where R. had an office, with knowledge that there would probably be persons there who would resent such conduct and might cause a breach of the peace, defendant and his companions, though intending themselves to act peaceably, were guilty of threatening, abusive and insulting behavior whereby a breach of the peace might be occasioned in violation of the above statute declaring that such conduct shall constitute disorderly conduct.

DISTURBING RELIGIOUS SERVICES.

Ellis v. State, Ala. App., 65 So. 412. *Between Services. Intent.* While the congregation, who had attended the regular morning services at a church, were eating a basket dinner on the church grounds, during the intermission before the afternoon services began, the defendant used language which created a disturbance. Held that the congregation assembled upon the church grounds for religious worship was protected by the statute though the disturbance took place at a time when the religious services were not in progress. In the language intentionally used by the defendant was such as to disturb the assembly, and did disturb them, it was not necessary to a conviction that it should have been uttered for the purpose of disturbing them. The conviction was affirmed.

ESCAPE AFTER CONVICTION.

State v. Pishner, W. Va., 81 S. E. 1046. *Conviction reversed.* The defendant was convicted of a felony and confined in jail pending a writ of error from that judgment. On Feb. 27 he broke jail and was recaptured the next day. On March 7 he was indicted for escaping. On June 17 the supreme court reversed the conviction in the former case and discharged him on the ground that there was no evidence to warrant the conviction. He was then tried on the second indictment and convicted. The statute under which he was this time convicted provides that "a person confined in jail on conviction of a criminal offense, who escapes by force or violence," shall receive a specified punishment. The majority of the court thought the statute applied only to persons who had been convicted by a final judgment of the court. The conviction in the trial court was not final, as a writ of error had issued and it was necessary to await the decision on the writ before it could be known whether the conviction was final. As the mandate of the supreme court reversed the judgment below and discharged the prisoner, it was conclusive proof that he was not guilty. Hence he did not escape while confined "on conviction of a criminal offense." Two judges dissented. The case is distinguishable from *State v. Lewis,* 19 Kan. 261, immortalized by Eugene T. Ware in the poem printed on page 266 of the official report. The Kansas statute applied to escape before conviction.

FORMER JEOPARDY.

State v. Rose, 106 N. E. 50, Ohio. *Identity of offense.* Where a person has been in jeopardy upon an information or affidavit charging that he contributed to the moral delinquency of a female person in violation of sec. 1654, General Code, such jeopardy cannot be successfully pleaded as a bar to a prosecution by indictment on a charge of rape under sec. 12413, General Code. The provision of the constitution relating to jeopardy is in the following words: "No person shall be twice put in jeopardy for the same offense." The offense charged in the information is not the same offense and does not include the offense charged in the indictment, and hence the defense of double jeopardy must fail. The words, "same offense," mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation.

People v. Mendelson, Ill., 106 N. E. 249. *Identity of offenses.* A trial and acquittal on a charge of burglary and larceny by breaking and entering the premises of certain parties at a certain street number was not sufficient as a plea of former jeopardy in the trial for the burglary and larceny of the goods of certain

other parties at the same street number, since the offenses were not identical within the rule that, if the facts charged in the subsequent indictment would, if found to be true, have warranted a conviction upon the first one, the former judgment is a bar to the subsequent prosecution, otherwise not.

INTOXICATING LIQUORS.

Skermetta v. State, Miss., 65 So. 502. *Serving wine with meals.* The defendant had three boarders at seventy-five cents per day. He served wine at dinner. No extra charge was made for the wine. All of the parties were natives of Austria, where wine forms a part of every dinner as a universal custom. Held that this constituted a sale of intoxicating liquors in violation of the prohibition law of the state.

LARCENY.

In re La Page, 216 Fed. 256. *Possession of stolen property as evidence of larceny.* While the possession of recently stolen property is some evidence that the possessor is the thief, such possession must be a conscious possession, and, where the evidence makes it at least just as probable that the stolen property was placed on the premises of the suspected party by someone else, the presence of the property on his premises has no probative force.

MORTGAGED CROPS.

Courtney v. State, Ala. App., 65 So. 433. *Sale to defraud mortgagee.* The defendant and his brother owned a tract of land. They agreed with one Hattaway to furnish the land and a team to cultivate it if Hattaway would furnish the labor, and that he should have half the crop raised, they the other half. Under the law of Alabama this arrangement fixed the legal title to the crop in the owners of the land, subject to a lien in favor of Hattaway, which had priority to all other liens on the crop, for the value of his half. After the making of the agreement with Hattaway the defendant and his brother mortgaged the crop to a bank. After this mortgage had been made and recorded, the defendant joined Hattaway in a mortgage of Hattaway's interest in the crop to one Tisdale. When the crop was harvested the defendant, either alone or in conjunction with his brother, sold it and paid the entire proceeds to the bank, to be applied on the debt to it. Held that the defendant was properly convicted of selling the crop with intent to hinder, delay or defraud the mortgagee. By the mortgage Tisdale became entitled to the benefit of Hattaway's first lien on the crop. While the bank under its mortgage was entitled to possession of the crop, subject to Hattaway's lien, it was not entitled to the entire proceeds from its sale. As the sale and payment of the entire proceeds to the bank would naturally tend to hinder, delay or defraud Tisdale, the jury were justified in drawing the inference that the defendant intended this result.

NOLO CONTENDERE.

Chester v. State, Miss., 65 So. 510. *Not an admission of guilt.* On the trial of the defendant for unlawfully keeping for sale intoxicating liquors, the state was permitted to prove that the defendant had been arraigned in the city court on the charge of keeping liquor for sale in violation of the city ordinance, the charge being based on the same facts testified to in the trial in the state court, and that her attorney had pleaded *nolo contendere.* It did not appear that she was present in the city court when that plea was entered. She had paid the fine imposed by that court. Held that the evidence should not have been admitted. While the plea had the same effect in the case pending in the city court as would a plea of guilty, it did not have any effect beyond that particular case, and could not be treated in a different proceeding as an admission of guilt.

PARDON.

People ex rel. Robin v. Hayes, Warden, 149 N. Y. Supp. 250. *Authority of a governor to pardon after being impeached.* Under the const., art. 4, sec. 5, providing that the governor shall have power to grant pardons, and sec. 6, providing that in case of impeachment of the governor, the powers and duties of the office

shall devolve upon the lieutenant-governor for the residue of the term, or until the disability shall cease, while the impeachment of a governor by the assembly did not deprive him of the office, the powers and duties of the office devolved upon the lieutenant-governor pending the trial of the charges, and an attempt thereafter by the governor to exercise the pardoning power was not valid as an act of a de facto governor, since a "de facto governor" is an actual governor in fact and reality, as distinguished from a governor de jure or by right, while to "devolve" means to transfer from one person to another, to deliver over, to hand down.

PROSTITUTION.

Johnson v. United States, 215 Fed. 679. *Meaning of "other immoral purpose" in White Slave Act.* The White Slave Act makes it a felony for anyone knowingly to transport, or cause to be transported or aid or assist in obtaining transportation for, or in transporting in interstate or foreign commerce, any woman or girl for the purpose of prostitution or debauchery, or any other immoral purpose. Held that while the term "prostitution" involves the financial element and signifies commercialized vice, the words "other immoral purpose" as used in the statute are not limited to kindred offeness involving the sharing of profits by hire of the woman's body, and hence their meaning was fulfilled by sexual debauchery between the female and the defendant involving no financial element.

TRIAL.

People v. Spencer, 106 N. E. 219, Ill. *Taking picture of defendant.* The taking of defendant's picture in the presence of the jury, during the recess of the court, showing him on the witness stand pointing his finger at the jury, was not prejudicial.

VARIANCE.

Spanish v. State, Fla., 65 So. 459. *Specific property stolen.* An information charging robbery alleged that the defendant stole a ten dollar bill, a five dollar bill, a one dollar bill and a silver dollar, all of the value of seventeen dollars. The state proved that the defendant took seventeen dollars, but did not show how this amount was made up. Held that there was a fatal variance between the charge and the proof, as the state had not proved that any of the money specifically described had been stolen. It was said that seventeen dollars in minor coins might have been stolen, and, if so, the defendant, on a new information charging theft of such minor coins, would have difficulty in establishing the fact that he had been previously convicted of that offense on the present information. The conviction was reversed.